



TC06059

Appeal number:TC/2016/06606

PROCEDURE – information notice – Schedule 36 Finance Act 2008 – information required – whether reasonably required – whether sufficiently identified – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

KEVIN KINSELLA

Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY'S Respondents
REVENUE & CUSTOMS**

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 30 June 2017

Mr Kevin Kinsella appeared in person

Mr Anthony O'Grady of HM Revenue & Customs appeared for the Respondents

Background

1. This is an appeal against an information notice issued to the Appellant, Mr Kinsella on 12 September 2016 (“the Notice”). The Notice was issued by Mr S O’Keefe, an Inspector of Taxes in the course of an enquiry into Mr Kinsella’s self-assessment tax return for 2013-14. It required Mr Kinsella to produce information in relation to entries in Mr Kinsella’s bank account as follows:

“ Your [name of bank] account [xxx/xxxxxxxx] refers.

1. Please advise what the deposits described as KTIC Ltd and Kinse UK Ltd relate to.
2. Please also let me know the source of the cheque deposits, £250 on 30 May 2013, £2,000 on 7 June 2013, £1,500 on 7 August 2013 and £2,000 on 22 August 2013.”

(The name of Mr Kinsella’s bank and account number have been anonymised for the purposes of this decision)

2. On 7 October 2016 Mr Kinsella appealed against the Notice. The grounds of appeal were that it was not within his power or possession to provide the information. Mr O’Keefe rejected the appeal and Mr Kinsella notified his appeal to the Tribunal on 25 November 2016. The grounds of appeal set out in the notice of appeal may be summarised as follows:

(1) It is unreasonable for HMRC to issue an information notice to provide information which is not available and is not within Mr Kinsella’s power or possession to provide.

(2) The information requested is too vague and does not specify the period it relates to.

3. At the hearing Mr Kinsella refined his grounds of appeal. He stated that he did not challenge the request for information at item 2 of the Notice. He did challenge the information required at item 1 on the basis that it was too vague. As such he argued that the Notice as a whole was invalid. I consider the parties’ submissions and arguments in more detail below.

Statutory Provisions

4. I can set out the relevant statutory provisions quite briefly. All references are to Schedule 36 Finance Act 2008.

5. Paragraph 1 provides that an officer of HMRC may by notice in writing require a taxpayer to provide information or documents if reasonably required for the purpose of checking the taxpayer’s tax position.

6. Paragraph 18 provides that an information notice only requires a person to produce a document if it is in the person’s possession or power. There is no equivalent provision in relation to information.

7. Paragraph 29(1) provides for a right of appeal against “the notice or any requirement in the notice”. Paragraph 32 then sets out the procedure for appeals against an information notice, including the jurisdiction of the Tribunal. In particular:

“(3) On an appeal that is notified to the tribunal, the tribunal may –

- 5 (a) confirm the information notice or a requirement in the information notice.
- (b) vary the information notice or such a requirement, or
- (c) set aside the information notice or such a requirement.
- 10 (4) Where the tribunal confirms or varies the information notice or a requirement, the person to whom the information notice was given must comply with the notice or requirement –
- (a) within such period as is specified by the tribunal, or
- (b) if the tribunal does not specify a period, within such period as is reasonably specified in writing by an officer of revenue and Customs
- 15 following the tribunal’s decision.
- (5) Notwithstanding the provisions of sections 11 and 13 of the Tribunals, Courts and Enforcement Act 2007 a decision of the tribunal on an appeal under this Part of this Schedule is final.”

20 **The Facts**

8. There was no issue in relation to the background facts. For present purposes I find the following relevant facts.

9. The enquiry into Mr Kinsella’s self-assessment return for 2013-14 was commenced by Mr O’Keefe by notice dated 16 December 2015. On the same date Mr

25 O’Keefe also wrote to Mr Kinsella in connection with his return for 2011-12. The letter stated that Mr O’Keefe was aware that Mr Kinsella had disposed of a property in 2011-12 but did not include the disposal in his return. He asked for details of the disposal and a capital gains tax computation.

10. Mr O’Keefe made an initial request for various items of information and

30 documents in connection with his enquiry into the return for tax year 2013-14. This included details and statements for all bank accounts operated by Mr Kinsella in that year and details in relation to Mr Kinsella’s PAYE income and dividend income. On 4 March 2016 Mr Kinsella provided some of the documents and information, including bank statements for 2013-14. Mr Kinsella stated that he operated only one

35 bank account in the relevant period.

11. The bank statements provided by Mr Kinsella covered the period 18 March 2013 to 7 April 2014. They included entries for the cheque deposits which subsequently comprised item 2 of the Notice (“the Specific Deposits”). There were

also a number of deposits by way of bank credits and transfers from KTIC Ltd and Kinse UK Ltd as follows:

Date	Source	Amount £
19 Aug 2013	Kinse UK Ltd	738.69
2 Sept 2013	Kinse UK Ltd	246.23
1 Oct 2013	Kinse UK Ltd	246.23
2 Oct 2013	Kinse UK Ltd	400.00
29 Oct 2013	Kinse UK Ltd	1,031.47
1 Nov 2013	KTIC Ltd	246.23
5 Nov 2013	KTIC Ltd	343.82
2 Dec 2013	KTIC Ltd	246.23
5 Dec 2013	KTIC Ltd	343.82
20 Dec 2013	KTIC Ltd	1,450.00
2 Jan 2014	KTIC Ltd	246.23
6 Jan 2014	KTIC Ltd	343.82
3 Feb 2014	KTIC Ltd	246.23
5 Feb 2014	KTIC Ltd	343.82
3 Mar 2014	KTIC Ltd	246.23
5 Mar 2014	KTIC Ltd	343.82
1 Apr 2014	KTIC Ltd	246.23

12. Mr O’Keefe reviewed the information provided. He considered that the bank statements provided did not show evidence of deposits of PAYE income or dividend income. On 25 April 2016 he wrote to Mr Kinsella stating that he had reviewed the information supplied. He identified at point (4) that there were some credits in the bank statements from KTIC Ltd and Kinse UK Ltd (“the KTIC/Kinse Deposits”), neither of which appeared to be companies for which Mr Kinsella worked in 2013-14, together with various unidentified cheque deposits. He asked for confirmation of which bank account the PAYE income and dividends were paid into. At points (5) and (6) of the letter Mr O’Keefe asked Mr Kinsella as follows:

“5. Turning back to the [bank] deposits from KTIC Ltd and Kinse UK Ltd, could you please advise what these relate to.

6. Could you please also let me know the source of the cheque deposits, £250 on 30 May 2013, £2,000 on 7 June 2013, £1,500 on 7 August 2013 and £2,000 on 22 August 2013.”

13. Mr Kinsella responded on 30 April 2016. In relation to the KTIC/Kinse Deposits he said that he would “revert to bank and advise you/answer you then”. In relation to the Specific Deposits he said that “again will revert to you when I have info”. On 3 May 2016 Mr Kinsella asked Mr O’Keefe to return all the documents he had sent in. The documents were returned on 11 May 2016. On 16 May 2016 Mr Kinsella wrote to acknowledge receipt and said that he would deal with points (5) and

(6) as soon as possible. On 23 May Mr Kinsella apologised for the delay which was caused by illness.

14. On 16 June 2016 Mr O’Keefe chased the information at points (5) and (6). Mr Kinsella was suffering from ill health but said that he would provide the further
5 information as and when he received it. Mr O’Keefe again chased the information at points (5) and (6) in a letter dated 6 July 2016. On 15 August 2016 Mr Kinsella wrote to say in relation to points (5) and (6) that the information was not in his possession but he had asked the bank to supply the information.

15. On 12 September 2016 the Notice was sent to Mr Kinsella who appealed the
10 Notice as indicated above. The Notice itself also stated as follows in the introductory paragraphs:

“I wrote to you on 25 April 2016 and sent a reminder letter on 6 July 2016 to ask for some information. I believe this is reasonably required ...

15 I have not received any of the items I asked for. Because of this, I am now issuing this notice. The attached schedule shows what I still need.”

Discussion and Reasons

16. At the outset of the hearing Mr Kinsella stated that he had no problem with item
20 2 of the Notice and that he would provide the information to Mr O’Keefe. However he maintained his argument that the request in item 1 was too vague and as a result the Notice itself was invalid.

17. It is clear that HMRC can only issue an information notice in respect of
25 documents or information reasonably required for the purpose of checking a taxpayer’s tax position. However that is not the only test for the validity of an information notice as the Upper Tribunal held in *Telng v Commissioners for HM Revenue & Customs [2016] UKUT 363 (TCC)*. In that case the Upper Tribunal was concerned with how the documents were to be provided. It found at [26] that the validity of an information notice did not depend purely on satisfying the reasonableness requirement in paragraph 1 Schedule 36. A notice which specified no
30 period of time for compliance was not a valid notice. At [27] the Upper Tribunal stated:

35 “ ... as the penalty is related to a compliance failure, it is clear that an information notice must, for that purpose, impose an obligation on a person to do something within a period of time. A penalty cannot arise unless there is a measurable breach of such an obligation...”

18. In *Sokoya v Commissioners for HM Revenue & Customs [2009] UKFTT 163 (TC)* HMRC incorrectly stated in a penalty notice sent to the taxpayer that he had been obliged to comply with an information notice under section 19A Taxes Management Act 1970 (“TMA 1970”) within 30 days of receipt, rather than within 30

days of determination by a Special Commissioner. It was accepted that the taxpayer had not been misled, but the FTT took the view that the error was fatal and the penalty notice was invalid.

19. In *GDF Suez Teeside Power Ltd v Commissioners for HM Revenue & Customs* [2017] UKUT 68 the Upper Tribunal recently considered the FTT decision in *Sokoya*. At [118] it stated as follows:

“118. ...[Sokoya] concerned a penal provision: the taxpayer was said to be liable to a penalty for his alleged failure to comply with an information notice by a date which had been incorrectly identified. In other words, he was said to be liable to a penalty for failing to do something which he could not lawfully have been required to do; moreover, it is well established that in a penal context any ambiguity must be construed in favour of the person penalised.”

20. Paragraph 1 Schedule 36 states that the information and documents required by a notice must be reasonably required for the purpose of checking the taxpayer’s tax position. If the information and documents are not sufficiently identified then the tribunal will not be able to satisfy itself what information or documents are required or whether they are reasonably required.

21. In the light of *Telng* and *GDF Suez* there is clearly a need for certainty in the description of information and documents required by an information notice because there are penalties for non-compliance. The information and documents required must be sufficiently identified so that it is possible to establish whether there has been a compliance failure and a “measurable breach of the obligation”. A taxpayer is entitled to challenge the validity of an information notice or a requirement in an information notice pursuant to paragraph 29 Schedule 36. Ambiguity in the description of the information or documents required must be a potential ground of appeal. The taxpayer does not have to wait until penalties are imposed for non-compliance before raising such a challenge. In my view a notice or a requirement in a notice which is too vague or ambiguous will not be valid and may be varied or set aside pursuant to paragraph 32(3) Schedule 36.

22. The test of whether information and documents are sufficiently described and therefore reasonably required is clearly an objective test. In other words whether a reasonable taxpayer receiving the notice would know what information and documents were required.

23. In correspondence Mr Kinsella expressed no doubt as to what was required by the information notice and appeared to understand perfectly well what was required. However his submissions on this appeal focussed on the fact that the schedule to the Notice gave no amounts or dates for the transactions in respect of which information was required. He submitted that it was incumbent on Mr O’Keefe to describe the information in as much detail as was possible. Otherwise there may be future disagreement about whether or not information had been properly provided. It would have been easy for Mr O’Keefe to identify the specific entries in respect of which the information was requested.

24. Mr Kinsella referred to the directions given to HMRC officers by HMRC in its Compliance Handbook which states:

“Your information notice must specify as clearly as possible the information and documents you require.”

5 25. The Compliance Handbook also states for example that documents should be described “as clearly and narrowly as possible”. The guidance is just that, it has no legal effect in itself. Having said that the Compliance Handbook is undoubtedly correct in that notices must be clear and free from ambiguity.

10 26. Mr O’Grady submitted that it was clear that what was requested in the Notice. The Notice was simply repeating what had been requested initially in Mr O’Keefe’s letter dated 25 April 2016 at points (5) and (6). The Notice itself identifies the bank account and describes the deposits by reference to the narrative appearing in the statements, namely KTIC Ltd and Kinse UK Ltd. Whilst the Notice does not specifically refer to the period 2013-14 or the dates of the KTIC/Kinse Deposits it is
15 clear in the context of the enquiry and the previous correspondence what is being required.

27. Mr O’Grady relied on section 114(1) TMA 1970 and what was said by the Court of Appeal in *Donaldson v Commissioners for HM Revenue & Customs [2016] EWCA Civ 761*. Section 114 provides as follows:

20 “ (1) An assessment or determination, warrant or other proceeding which purports to be made in pursuance of any provision of the Taxes Acts shall not be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect or omission therein, if the same is in substance and effect in conformity with or
25 according to the intent and meaning of the Taxes Acts, and if the person or property charged or intended to be charged or affected thereby is designated therein according to common intent and understanding.”

28. Donaldson concerned penalties for late filing of tax returns and amongst other things a statutory requirement to state in the penalty notice the period in respect of which the penalty was assessed. The notice in question did not state the period. The
30 Court of Appeal held that this fell within section 114(1). The Master of the Rolls outlined the documentation available to the taxpayer at [29] and then said:

“ 29 ...The omission of the period from the notice was, therefore, one of form and not substance. Mr Donaldson was not misled or confused by the omission. The effect of section 114(1) is that the omission does not affect the validity of the notice.”

35 29. Paragraph 56(b) Schedule 36 provides that section 114 applies to an information notice issued under Schedule 36. The effect of section 114 according to its rather arcane language is that the validity of an information notice is not affected by any mistake, defect or omission in the notice if:

40 (1) the notice is in substance and effect in conformity with the intent and meaning of Schedule 36, and

(2) if the person affected by the notice is designated in the notice according to common intent and understanding.

5 30. There are a number of authorities on the application of section 114 relating to errors in documents, such as stating an incorrect date. However, it does not seem to me that section 114 has any application in the present circumstances.

31. Schedule 36 does not require any specific form which an information notice must take. The most that might be said in relation to a taxpayer notice is that:

(1) it must be addressed to a specific taxpayer,

10 (2) if it is an approved notice (which the present notice is not) then it must state that the notice is given with the approval of the tribunal (see paragraph 6 Schedule 36), and

(3) it must set out the period within which, the means and the form by which the information and documents are to be provided (see paragraph 7 Schedule 36)

15 32. In the absence of any formal requirements in relation to the description of the information and documents required by an information notice, no question arises as to whether an omission is one of form or substance. The question in the present appeal is whether the requirement in item 1 of the Notice has been set out in such a way that a reasonable taxpayer reading the notice would know what information and documents
20 are required. In particular, whether the omission of the dates and amounts of the KTIC/Kinse Deposits causes the requirement to be ambiguous such that the Notice ought to be set aside.

25 33. Mr O'Grady submitted that Mr Kinsella knew from the correspondence leading up to the Notice precisely what information was being required. In particular he knew from the Notice that it referred to the bank account. He knew that the only statements asked for and provided were for the tax year 2013-14 and that the statements had been sent back to Mr Kinsella.

30 34. I accept that is the case, and I would go further and observe that the Notice itself referred to the outstanding request for information in Mr O'Keefe's letters dated 25 April 2016 and 6 July 2016. The letter of 25 April 2016 identified various items of information including items (5) and (6). By 6 July 2016 some of the information required had been provided but not in relation to items (5) and (6). Mr O'Keefe's letter dated 6 July 2016 was limited to a request in relation to items (5) and (6). It is clear that the request in those letters referred to the period 6 April 2013 to 5 April
35 2014.

35. The position is in my view similar to the question of whether two or more documents read together can constitute a notice of intention to open an enquiry into a self-assessment return for the purposes of section 9A TMA 1970. That question was considered by the Upper Tribunal in *Commissioners for HM Revenue & Customs v Mabbutt [2017] UKUT 0289 (TCC)*, released after the hearing in the present appeal. It
40 considered the question in the context of arguments as to whether notice of intention

to open an enquiry was given in two documents. It appears to have been common ground in that case that two documents read together could constitute notice of intention to open an enquiry. As to whether they did the Upper Tribunal at [47] outlined the following approach:

5 “47. ...The question is whether a reasonable taxpayer receiving the two letters of 17
January 2011 would have understood them as having to be read together and from that
composite communication would have understood that they were intended to give the
taxpayer notice of HMRC’s intention to open an enquiry into a return. Mr Mabbutt, or
to be more precise a reasonable taxpayer, could not reasonably have thought that the
10 copy of the Dickinsons letter sent to him was a separate document, unrelated to the
enquiry and provided for some other purpose. Any dispassionate and reasonable reader
of the Mabbutt letter would recognise that it could be fully understood only if read
together with the Dickinsons letter; the latter was incorporated by reference into the
former.”

15 36. In my view there is no reason why correspondence should not be incorporated
into an information notice by reference. So for example, an information notice might
require production of information or documents specified in a letter previously sent to
the taxpayer. In those circumstances it would be clear reading the notice together with
20 the letter precisely what was required. The present facts are not materially different.
The Notice incorporated the letters dated 25 April 2016 and 6 July 2016. From those
letters it is clear that item 1 of the Notice requires an explanation of the KTIC/Kinse
Deposits appearing in the bank statements for the period 6 April 2013 to 5 April 2014.

25 37. I am conscious that the decision in Mabbutt was released after the hearing in
this appeal and the parties have not had an opportunity to make submissions as to its
significance. However, even if I am wrong and the letters were not incorporated into
the Notice as such, the Notice should still not be construed in isolation from the
correspondence which preceded it. In the present circumstances I am satisfied that on
30 any reasonable view of the Notice, in the context of the letters dated 25 April 2016
and 6 July 2016 referred to in the Notice, what was required from Mr Kinsella was an
explanation of the KTIC/Kinse Deposits appearing in the bank statements for the
period 6 April 2013 to 5 April 2014.

35 38. Mr Kinsella suggested that he was being asked to do the work of the inspector
in working out which deposits he was being asked to explain. I do not accept that is a
fair description of the position. It is abundantly clear what information Mr O’Keefe
requires and it ought to be straightforward for Mr Kinsella to provide the information.
I accept that it might have been better practice for the Notice to specifically identify
the KTIC/Kinse Deposits as I have done in the table above. However the failure to do
so does not in my judgment cause any ambiguity. It is clear to Mr Kinsella what is
40 required. Mr Kinsella suggested that there was a risk he might miss an entry. I do not
accept that there is any such risk if Mr Kinsella takes reasonable care to comply with
the Notice, which he is obliged to do.

45 39. In the light of my decision, Mr Kinsella’s argument that if item (1) is too vague
and therefore invalid then the Notice as a whole is invalid does not arise. I would in
any event reject the argument. It is clear from paragraph 29 that a notice of appeal can

be against the notice as a whole or any requirement in the notice. Further, paragraph 32(3) provides that on an appeal the tribunal can confirm, vary or set aside the information notice or a requirement in the notice. The appeal provisions clearly intend the tribunal to look at specific requirements in an information notice and to consider whether individually they should be confirmed, varied or set aside. Alternatively, there may be situations where a notice as a whole may be invalid and falls to be set aside. A notice as a whole may be invalid if it was issued in circumstances not permitted by Schedule 36. For example, paragraph 21 provides that where a person has made a tax return in respect of a chargeable period, a taxpayer notice may not be given in relation to that chargeable period unless certain conditions are met. If the conditions had not been met then the notice as a whole would be set aside. That is not the case here.

Conclusion

40. For the reasons given above I am satisfied that the information required by the Notice is sufficiently identified in the Notice. Further, it is reasonably required to check Mr Kinsella's tax position. I therefore confirm the Notice and both requirements set out in the Schedule to the Notice. The appeal is accordingly dismissed.

41. Paragraph 32(4) Schedule 36 makes provision in those circumstances for the Tribunal to specify a period for compliance with the Notice. Mr Kinsella should provide the information required by the Notice within 30 days from the date of release of this decision.

42. Pursuant to paragraph 32(5) Schedule 36 Finance Act 2008 there is no right of appeal against this decision.

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30 **JONATHAN CANNAN**
TRIBUNAL JUDGE

RELEASE DATE: 10 AUGUST 2017